85-1756

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHN V. POOL, III,
Petitioner
VS.
STATE OF MISSISSIPPI,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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QUESTIONS PRESENTED

1. Whether Petitioner was denied due process of law where the Trial Court refused to allow testimony establishing that the chief witness for the State had lied as to Petitioner's guilt and where the Mississippi Supreme Court, in affirming the Petitioner's conviction, recognized such exclusion to be error but "harmless error"?

2. Whether Petitioner was denied due process of law where the Mississippi Supreme Court considered testimony made outside of the presence of the Jury in evaluating Petitioner's conviction?

RULE 28:1 STATEMENT

Parties to this case are:

John V. Pool, III, an individual

State of Mississippi

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John V. Pool, III respectfully prays that Writ of Certiorari issue to review the decision of the Supreme Court of Mississippi denying Petitioner's Petition for Rehearing. See **John V. Pool, III v. State of Mississippi,** Number 55,944.

OPINIONS BELOW

The decision of the Supreme Court of Mississippi which denies Petitioner his Petition for Rehearing was handed down on February 26, 1986 without written opinion. The original decision of the Supreme Court of Mississippi affirming Petitioner's conviction in the Circuit Court of the First Judicial District of Jones County, Mississippi, for possession of schedule II drugs and sentencing Petitioner to twenty-five (25) years in the Mississippi State Peniteniary plus payment of a Fifty Thousand ($50,000.00) Dollar fine and Court costs, is reported as **Pool v. State,** -483 So. 2nd 331 (1986), decided February 5, 1986. The

decision denying the Petition for Rehearing appears as Appendix A and the opinion of the Supreme Court of Mississippi affirming Petitioner's original conviction as Appendix B.

JURISDICTION

The juridiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved is the Fourteenth Amendment of the United States Constitution.

Amendment XIV: Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The federal questions sought to be reviewed were first raised by Petitioner as follows: At trial Petitioner preserved the excluded testimony of Attorney Dan Wise by an offer of proof. The exclusion of this evidence was assigned as error by the Petitioner and preserved as an issue on appeal. The Supreme Court of Mississippi found that the exclusion of the evidence in question was error, but "harmless error." The Fourteenth Amendment implications of this issue were first addressed in the Petition for Rehearing. Since the Supreme Court of Mississippi did not issue a written opinion in response to the Petition for Rehearing, Petitioner has no knowledge as to how this constitutional or federal question was decided upon by the Supreme Court of Mississippi other than that his Petition for Rehearing was denied.

The Mississippi Supreme Court's misconception that Petitioner testified at trial did not become an issure until the

Mississippi Supreme Court rendered its decision in this case. Petitioner immediately addressed the Constitutional implications of this misconception in his Petition for Rehearing. Since the Supreme Court of Mississippi did not issue a written opionion in response to the Petition for Rehearing, Petitioner has no knowledge as to how this constitutional or federal question was decided upon by the Supreme Court of Mississippi, other than that his Petition for Rehearing was denied.

STATEMENT OF THE CASE

Petitioner, John V. Pool, III, is presently incarcerated under custody of the Mississippi Department of Corrections. On or about August 6, 1984, Petitioner was convicted in the Circuit Court for the First Judicial District of Jones County, Mississippi, of possession of Schedule II drugs and was sentenced to serve a term of twenty-five (25) years in the custody of the Mississippi Department of Corrections and was further sentenced to pay a fine in the amount of Fifty Thousand ($50,000.00) Dollars. A timely appeal was filed with the Mississippi Supreme Court and in a decision dated February 5, 1986, the Mississippi Supreme Court affirmed Petitioner's conviction (**Pool v. State,** 483 So.2d 331 (1986)). See Appendix B. Petitoner filed a timely Petition for Rehearing and this Petition was denied by the Mississippi Supreme Court in a decision dated February 26, 1986 without written opinion. See Appendix A.

Statement of Facts*

The focus of this Petition is the Trial Court's exclusion of the testimony of attorney Dan Wise and the finding by the Mississippi Supreme Court that although the Trial Court should have allowed Wise to testify, this omission constituted "harmless error." This Petition also focuses on the Mississippi Supreme Court's apparent misconception that Petitioner testified at trial when, in fact, Dan Wise was the only witness offered by Defendant at trial.

---

*References preceded by "A" are to the attached Appendix; references preceded by "R" are to the original record.

The most important witness for the State at the trial below was Vance Steverson. Steverson testified at trial that he and Petitioner obtained the drugs together and split them between themselves. (A6) Dan Wise represented Petitioner in a separate but related criminal matter in Forrest County, Mississippi. He did not represent Petitioner regarding the instant matter in Jones County, Mississippi. Wise met with Vance Steverson on two separate occasions in the Forrest County Jail in Hattiesburg, Mississippi. Wise testified during the proffer, outside of the presence of the Jury, that Steverson told him that Pool had not been involved with the drugs in question. Steverson told Wise that narcotics officers had "suggested" to him that if Steverson testified against Pool, certain other, unrelated charges in Jones County "might not be brought up" against Steverson. (A20-21)

Steverson admitted at trial that he changed his story on several occasions and told several people prior to the trial that Pool had not been involved with the drugs. However, Steverson attempted to rehabilitate this change in testimoney by stating that he had made statements favorable to Pool in order to obtain favorable treatment, including possible clemency, through Pool's father. (A6) Wise's proffered testimony not only estabished Steverson's change in testimony, it contradicts Steverson's alleged motive for having made statements favorable to Pool. According to Wise's testimony, Steverson's change in testimony came in an attempt to strike a bargain with officers in Jones County. (A21)

Vance Steverson was a critical witness in this case. As a co-conspirator granted an immunity by the State, his credibility was very much at issue. Wise's testimony went to the heart of that issue, and Wise should have been allowed to testify. In addition, it should be noted that John Pool did not testify at the trial in this case. The written opinion of the Mississippi Supreme Court seems to have misconstrued the record in that respect.* Pool did testify during the pretrial hearing on a Motion to

*Even in its statement of facts, the Mississippi Supreme Court incorrectly refers to Pool's "testimony at trial (A5)."

Quash. Nevertheless, in the discussion of the "CONSTRUCTIVE POSSESSION" issue, the Mississippi Supreme Court indicates that there was testimony at trial by Pool:

> "In this case, the drugs in question were found in a trailer **admittedly** owned by Pool. He **also admitted** that the bedroom in which the drugs were found was his,..." (emphasis supplied)

The record **at trial** contains no such statements or admissions by Petitioner. Thus, this case turns to a large extent on the testimony of Vance Steverson. While Petitioner did testify at the pretrial motion, he did not testify at trial and his pretrial testimony was not presented to the Jury that convicted him.

I

PETITIONER WAS DENIED DUE PROCESS OF LAW WHERE THE TRIAL COURT REFUSED TO ALLOW TESTIMONY ESTABLISHING THAT THE CHIEF WITNESS FOR THE STATE HAD LIED AS TO PETITIONER'S GUILT AND WHERE THE MISSISSIPPI SUPREME COURT, IN AFFIRMING PETITIONER'S CONVICTION, RECOGNIZED SUCH EXCLUSION TO BE ERROR BUT "HARMLESS ERROR."

At the outset of this Argument, Petitioner notes that the Mississippi Supreme Court found that the testimony of Dan Wise should have been admitted into evidence, citing its decision in **Barnes V. State,** 450 So.2d 126 (Miss., 1984). Nevertheless, the Mississippi Supreme Court found that failure of the Trial Court to allow Dan Wise to testify constitued "harmless error." While not cited by the Mississippi Supreme Court, the Court was specifically relying on Rule II of the Rules of the Mississippi Supreme Court which provides as follows:

> "No judgment shall be reversed on the ground of misdirection to the jury, or the improper admission or exclusion of evidence, or for error as to the matter of pleading or procedure, unless it shall affirmatively appear, from the whole record, that such judgment has resulted in a miscarriage of justice."

The Mississippi Supreme Court's specifically held:

> "While Wise's statement should have been admitted, it is clear that Pool's attorney got all of the mileage that he could out of Steverson's inconsistent statement. The Jury was aware that Steverson's story had changed several times, and Wise's testimony would have been merely cumulative. No reversible error was committed in excluding it."

This Petitioner submits that the complete exclusion of a proposed witness on Petitioner's behalf at trial and the finding of "harmless error" by the Mississippi Supreme Court violate this Court's decision in **Chambers v. Mississippi,** 410 U.S. 284, 35 L.Ed. 2d 297, 93 S.Ct. 1038 (1973).

In **Chambers,** this Court held that rulings on evidentiary issues in criminal cases may constitute a constitutional deprivation where such rulings deprive a Defendant of due process of law under the Fourteenth Amendment of the United States Constitution. Ironically, **Chambers** deals with another criminal case from the State of Mississippi. In fact, in **Chambers,** this Court was primarily concerned with Mississippi's "voucher" rule. The Petitioner in **Chambers** was not allowed to cross-examine a witness on the basis of the Mississippi common-law rule that a party may not impeach his own witness.

On cross-examination by the State, the witness in **Chambers** repudiated a confession which was the Petitioner's

alibi. Petitioner in that case was not allowed to cross-examine the witness on the basis that in Mississippi a party "vouches" for his witnesses and may not impeach his own witness even if that witness becomes hostile.

In **Chambers,** in addition to refusing to allow the Defendant to cross-examine his former alibi witness, the Trial Court also refused to allow him to introduce testimony of three additional witnesses to contradict the changed testimony of the witness in question. This Court viewed the decision to prevent these witnesses from testifying as a materialistic limitation on the declaration against interest heresay exception.

Both **Chambers** and the present case deal with the fundamental right of an accused to present witnesses in his own defense. In **Chambers,** Justice Powell, writing for the Majority, state as follows:

> "Few rights are more fundamental than that of an accused to present witnesses in his own defense." (35 L.Ed 2d at 312)

In the present matter, the Mississippi Supreme Court found that "Wise's testimony would have been merely cumulative." Petitioner submits that Wise's proffered testimony is not "cumulative" for several reasons.

(1) While Steverson admitted during his testimony at trial that he told several people that Pool was not involved with the drugs, Steverson repeatedly attempted to lessen the impact of those admissions. Steverson testified that he had received promises from Petitioner that Petitioner's father "would get me out within four months." In admitting to Wise that he was setting Petitioner up, Steverson made no mention of the alleged promise from Pool that Pool's father could deliver clemency. Steverson simply admitted to Wise that he was implicating Petitioner, despite Petitioner's innocence, to obtain a better deal for himself from the Jones County authorities.

(2) Steverson admitted to Wise that he would, in effect, perjure himself at Petitioner's trial.

(3) There is a substantial difference between Steverson's testimony that he lied in the past about Pool's innocence so that he could obtain the help of Pool's father, and the testimony of Dan Wise that Steverson lied at trial about Pool's guilt in order to obtain a **nolle prose** which in fact he was granted. Wise's proffered testimony was the only evidence which could have corroborated the claim by Petitioner that Steverson was lying when he testified against Petitioner at the trial of this matter.

(4) Contrary to the impression given by the opinion of the Mississippi Supreme Court, Steverson, while admitting to some prior inconsistent statements, did not readily admit his prior inconsistent statements to attorney Dan Wise. The record reveals the following testimony by Mr. Steverson on cross-examination:

"A I remembered I told Dan Wise -- Mr. Wise asked me if Johnny had anything to do with it, and he wanted to know the truth and I told him the truth.

I told him, yeah, Johnny knew about it.

Q Didn't you tell Mr. Wise at the Forrest County Jail sometime in early May of this year when you were confined down there and he talked to you in that jail, did you tell him that Johnny Pool did not know or have anything to do with the drugs that were found at his trailer?

A I don't remember it.

Q Mr. Steverson, would you deny it?

A I won't deny that I told him that, no." (R165-166)

Thus, without the testimony of Dan Wise, the Jury in this case was left with contradictory and equivocal testimony by Vance Steverson as to his meeting with Dan Wise in the Forrest County Jail. Wise, on the other hand, was very specific and would have testified as follows:

> "I met with Mr. Steverson in the Forrest County Jail... and initially when I met with Mr. Steverson, he advised me that Mr. Pool was not involved with the drugs that are in question in this case and that he did not have any knowledge of this..." (R192-193) (A20-21)

Wise, according to his offer of proof, would have testified that he then became aware that Steverson intended to change his testimony regarding Pool's involvement in order to gain favor from police officers in Jones County. Wise then testified:

> "When I became aware of that, I .... went back to see Mr. Steverson either the next day or a day or two later, at which time he told me that he would like to help Mr. Pool out with testimony, but that he had been made aware that if he did testify in Court as to what he told me previously, that he would have further difficulty in Jones County." (R193) (A21)

Where Steverson's testimony was equivocal and contradictory on this issue, Wise's testimony, if allowed to have been presented to the Jury, would have been direct and unequivocal. Certainly, in light of this difference alone, the Mississippi Supreme Court's finding that Wise's testimony was "merely cumulative" is highly suspect and should not be allowed to deny Defendant from presenting a witness on this issue.

In addition, Steverson was the sort of witness whose testimony must be "viewed with caution and suspicion." **Barnes v. State,** 460 So.2d at 132. Wise, on the other hand, is an attorney in good standing with the Mississippi Bar, an

attorney with an excellent reputation. The Jury should have been allowed to weigh the credibility of Steverson, a witness to be viewed with **suspicion,** in light of the testimony of Dan Wise.

The decision of the Mississippi Supreme Court in this case is particularly invidious in terms of the Fourteenth Amendment. First, the Mississippi Supreme Court cites its decision in the **Barnes v. State, supra,** an appropriate citation in light of the close parallel between the facts in **Barnes,** and the facts in the present case. Then, without further discussion and without any attempt to distinguish its decision in **Barnes,** the Mississippi Supreme Court finds that the error in the present matter was "harmless." Petitioner submits that the error by the Trial Court in this case, was no less prejudicial than the error by the Trial Court in **Barnes.**

In **Barnes** the Defendant was convicted of two separate counts of the unlawful transfers of drugs. The chief witness against Barnes was Arthur Ray Moody, the alleged recipient of the drugs in question. At issue was the Trial Court's refusal to allow Moody's attorney to testify regarding an alleged agreement between Moody and the State. The proffer of evidence was such that Moody's attorney would have testified that in exchange for Moody's testimony against Barnes, Moody would have received "favorable treatment" (**Barnes** at 128), "nothing would be done on it" (**Barnes** at 129).

Moody, like witness Steverson in the present case, did not deny during his testimony that he had received promises of leniency in exchange for his testimony against Barnes.

In **Barnes** the Mississippi Supreme Court found that the excluded testimony by Moody's attorney was neither hearsay nor violation of the attorney-client privilege. The Court in **Barnes** specifically rejected the State's argument that the error in **Barnes** was "harmless error."

Trial courts have been notorious in their manipulation of archaic evidentiary rules as they pertain to criminal defendants. This court's decision in **Chambers v. Mississippi, supra,** is ample evidence of this fact. The finding by the Mississippi Supreme Court that Wise's testimony was "merely cumulative" is particularly manipulative, in light of the fact that only witnesses for the State had been presented at the time Wise's testimony was offered. In fact, Wise was the only witness offered by Defendant during his trial. Evidence is generally found to be "cumulative" where a party presents witnesses who simply repeat the same evidence. Certainly, a finding of "cumulative evidence" does not seem appropriate where the witness in question was Defendant's first and only witness.

Petitioner submits that the exclusion of Wise's testimony in this case was an error of constitutional magnitude, denying Petitioner the fundamental right to present witnesses in his own defense. The finding of "harmless error" by the Mississippi Supreme Court is in direct conflict with this Court's decision in **Chambers** and the Mississippi Supreme Court's own decision in **Barnes.**

For the above reasons, Petitioner submits that this Court should grant certiorari in the present matter.

II.

PETITIONER WAS DENIED DUE PROCESS OF LAW WHERE THE MISSISSIPPI SUPREME COURT CONSIDERED TESTIMONY MADE OUTSIDE OF THE PRESENCE OF THE JURY IN EVALUATING PETITIONER'S CONVICTION

As discussed **supra,** there was a apparent misconception by the Mississippi Supreme Court that Petitioner testified at the trial below. While Petitioner did, in fact, testify at the hearing

regarding his Motion to Quash, he did not testify at trial and his testimony at the motion hearing was not before the Jury that decided this case.

The Courts have repeatedly held that testimony made outside of the presence of a jury cannot be properly considered in evaluating the sufficiency of evidence on appeal, **U.S. v. Escobar,** 674 F.2d 469 (5th Cir., 1982). Nevertheless, in its discussion of the "constructive possession" issue, this Court stated as follows:

> "In this case, the drugs in question were found in a trailer **admittedly** owned by Pool. He also **admitted** that the bedroom in which the drugs were found was his...." (emphasis supplied)

The record in this case obtains no such admissions by John Pool, because Pool did not testify at the trial below. Not only has the Mississippi Supreme Court misconstrued the record below, but it has ascribed "admissions" to Pool. Once again, the error in question has Constitutional implications, **Miranda v. Arizona,** 384 U.A. 436, 16 L.Ed. 694, 86 S. Ct. 1602 (1966).

Since the Mississippi Supreme Court relied on alleged "admissions" by Petitioner, and since it is clear that Petitioner did not testify at trial, it would seem incumbent upon the Mississippi Supreme Court to have delineated the circumstances during which the alleged "admissions" were given. It would seem further incumbent upon the Mississippi Supreme Court to determine whether or not such "admissions" were given under circumstances which required **Miranda** warnings, and, if so, whether or not such "admissions" were given on a voluntary basis. Obviously, none of these issues were discussed by the Mississippi Supreme Court in its decision in this case.

There is still a further Constitutional implication from the Mississippi Supreme Court's misconception and misuse of the

record below. Since Petitioner did not testify at trial and since the Mississippi Supreme Court could not rely on any "admissions" or "confessions" made to law enforcement agents, the Mississippi Supreme Court, in effect, commented by implication on Petitioner's failure to testify at his trial below. Such coment, even by implication, is in direct contradiction of this Court's decision in **Griffin v. California,** 380 U.S. 609, 85 S. Ct. 1229, 14 L.Ed. 2d 106 (1965). This Court has given complete protection to a Defendant, such as Petitioner, who chooses not to testify at his trial.

Petitioner submits that the above constitutional issues arise from the Mississippi Supreme Court's apparent misconception that Petitioner testified at the trial below. Because of these issues, certiorari should be granted in this case, particularly when the Mississippi Supreme Court's misconception is coupled with its finding of "harmless error" in connection with the Trial Court's exclusion of the testimony of Dan Wise.

CONSLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Post Office Box 368
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601/544-8291

Counsel for Petitioner,
John V. Pool, III

CERTIFICATE OF SERVICE

I, Michael Adelman, hereby certify that I have on this the 24th day of April, 1986, caused three copies of the above and foregoing Petition for a Writ of Certiorari to the Supreme Court of Mississippi to be served by United States Mail, certified, return receipt requested, upon the following counsel of record for the Respondent:

Honorable J. Ed Pittman
Attorney General for the State of Mississippi
Post Office Box 229
Jackson, Mississippi 39205

MICHAEL ADELMAN

APPENDIX

APPENDIX "A"

IN THE SUPREME COURT OF MISSISSIPPI
DECISIONS HANDED DOWN FEBRUARY 26, 1986
(Continued - Page 3)

PATTERSON, C.J. (Cont'd):

X 55,338 Annie McCallister Gray v. Nelson W. Gray; Chancery, Alcorn; Reversed and Remanded.

56,164 Charles E. Smith & Terry Smith v. Massey Ferguson Credit Corporation; Circuit, Bolivar; Affirmed.

THE COURT SITTING EN BANC:

54,123 Bankers Life & Casualty Co. v. Lloyd M. Crenshaw; Circuit, Jackson; Petition for Rehearing Denied. Walker, P.J., Hawkins, Prather and Robertson, JJ., Dissent.

54,123 Bankers Life & Casualty Co. v. Lloyd M. Crenshaw; Circuit, Jackson; Motion to Correct Judgment Overruled.

54,966 John Keith Henry v. State; Cirucit, Newton; Petition for Rehearing Denied. Original Opinion Modified. Roy Noble Lee, P.J., Not Participating.

55,016 Audrey Smith v. Cleveland Truck & Tractor Repair, Inc.; Circuit, Bolivar; Motion for Stay of Mandate Overruled. Petition for Rehearing Denied.

55,053 Donald William Dufour v. State; Circuit, Hinds; Petition for Rehearing on Motion to Vacate Judgment and Sentence Denied. Anderson, J., Not Participating.

55,328 Edmond L. Ratliff v. City of Jackson, MS; Circuit, Hinds; Petition for Rehearing Denied.

55,944 John V. Pool, III v. State; Circuit, Jones; Petition for Rehearing Denied.

APPENDIX B

IN THE SUPREME COURT OF MISSISSIPPI
No. 55,944

Decided, Feb. 5, 1986

JOHN V. POOL, III

V.

STATE OF MISSISSIPPI

Before ROY NOBLE LEE, DAN LEE and PRATHER DAN LEE, JUSTICE, FOR THE COURT:

John Pool was indicted, on February 27, 1984, for possession of several Schedule II drugs, and, after arraignment and appointment of counsel on July 24, 1984, trial was set for July 31, 1984.

Pool's counsel moved for an unspecified continuance on July 30, 1984. At a pretrial hearing, the trial judge rescheduled the trial for the last week of the July term. The case came on for trial on August 6, 1984, apparently without objection from defense counsel.

The jury found Pool guilty as charged. He was sentenced to 25 years in the Mississippi State Penitentiary, plus payment of a

$50,000.00 fine and all costs.

Pool apppeals, assiging as error the following:

I. The trial court erred in refusing to grant the Motion to Quash the Search Warrant and the return thereon and to suppress the evidence obtained thereby.

II. The trial court erred in refusing to grant sufficient time for appellant's counsel to prepare the defense of this case.

III. The trial court erred in refusing to grant the motion for a directed verdict of not guilty at the conclusion of the State's case.

IV. The trial court erred in limiting and restricting the testimony of the defense witness Dan Wise concerning prior inconsistent statements of a State's witness.

STATEMENT OF FACTS

Laurel police arrested Vance Steverson, either on the night of November 3rd or the early morning hours of November 4th, on a drug violation. After the arrest, Steverson informed the police that a quantity of drugs stolen during a drug store burglary in Petal, Mississippi, were stored at John Pool's trailer and in his possession. As a result of receiving that information, the police obtained a warrant to search Pool's residence.

The warrant authorized search of the property occupied and controlled by "Johnny Poole, Mitchell Strickland and Vance Steverson," which was described as follows:

> Beginning at the intersection of Holly Street and Church Street in the City of Ellisville, and traveling north on Church Street for 6/10's of a miie to a gravel road; being the entrance to Jones Trailer Park. Turning left onto said gravel road and traveling approximately 50 yards to the 3rd house trailer on the right. Being more specific said house trailer being brown and yellow in color and having a tall wood fence around porch. This being in the City of Ellisville, 1st Judicial District of Jones County, Mississippi. Beat #4.

The arresting officers testified that the directions indicated on the warrant corresponded with their route, and that Pool's trailer could be located by using those directions.

Upon arriving at the trailer, the officers announced their presence. When no one answered the door, they forced their way inside. Upon finding John Pool inside, an officer testified that he served Pool with a copy of the warrant. Pool's testimony contradicted this, and he asserted that he never saw the warrant until he arrived at the jail. The trial judge overruled the motion to suppress.

The officers found Mitchell Strickland asleep in a bedroom of the trailer. He was awakened by the officers, and both he and Pool were seated in the living room while the search took place. The officers found a red onion bag beneath the bed on which Strickland had been sleeping, and that bag contained the drugs described by Steverson. Pool stated to the officers that the trailer was his, and that the master bedroom (in which Strickland was found sleeping) was also his. This was his testimony at trial also, and it was corroborated by Strickland.

Steverson testified at trial that he and Pool obtained the drugs together and split them between themselves. According to Steverson, Pool told him that he intended to sell his part of the drugs in Hattiesburg. This is the story that Steverson originally told the arresting officers. However, he later told a Hattiesburg police officer that the drugs were not Pool's and that Pool did not know that they were in the trailer. According to Steverson, he made the statement after Pool told him that his father was a friend of the governor's, and could help get him out. Steverson retracted his statement at trial, and he stated that Pool "knew what was going on."

On cross-examination, Steverson admitted that he told others that the drugs were entirely his. He was asked about a statement allegedly made to Dan Wise, who represented Pool in another criminal case. The following exchange between steverson and defense counsel ensured:

Q. Didn't you tell Mr. Wise at the Forrest County Jail sometime in early May of this year when you were confined down there and he talked to you in that jail, didn't you tell him that Johnny Pool did not know or have anything to do with the drugs that were found at his trailer?

A. I don't remember it.

Q. Mr. Steverson, would you deny it?

A. I won't deny that I told him that, no.

Steverson also admitted that the District Attorney had promised to nolle prosequi a charge of possession of drugs, in return for his testimoney, and that the DA "would try and help me because he believed that I have learned my lesson."

The defense called Dan Wise to testify to the conversation between himself and Steverson. The prosecutor's objection to the testimony was sustained, on the grounds that Steverson had admitted the conversation. After the proffer, the following exchange took place:

THE COURT:

Why isn't it hearsay testimony?

MR. MOYNIHAN:

Why isn't it?

THE COURT:

Yes.

MR. MOYNIHAN:

Because it is evidence of a contradictory or an inconsistent statement made by the other witness.

THE COURT:

What is inconsistent about it?

MR. MOYNIHAN:

As I understood the witness, he did not admit having any statement to Mr. Wise.

. . . .

THE COURT:

All right. In that event, it is not necessary to look it up because he didn't deny it.

It wouldn't be contradictory to what he said.

I sustain the objection to this testimony.

Pool was found guilty as charged and sentenced to 25 years, with a $50,000.00 fine.

I.

THE SEARCH WARRANT.

Pool's first assignment of error deals with the trial court's failure to quash the search warrant and return and its failure to suppress the evidence derived thereby. In his brief, he states as grounds that: (1) the description on the warrant of the property to be searched was overly vague and uncertain, and a person unfamiliar with the area could not have found the property by using that description; (2) that the uncorroborated testimony of Officer Landrum as to service of the warrant was insufficient in light of Pool's denial; and (3) that the state should have prosecuted "those charged with crime on the evident and apparent crimes these persons are guilty of and not to trade off one defendant against another for the purpose of ammassing [sic] evidence of a more serious nature against one of the defendants."

The Mississippi Supreme Court has repeatedly held that:

> Descriptions in search warrants need not be positively specific and definite, but are sufficient if the places and things to be searched are designated in such manner that the officer making the search may locate them with reasonable certainty.

Cole v. State, 237 So.2d 443 (Miss. 1970). **See also Williams v. State,** 198 Miss. 848, 23 So.2d 692 (1945); **Holston v. State,** 161 Miss. 654, 137 So. 501 (1913); **Matthews v. State,** 134 Miss. 807, 100 So. 18 (1924); **Bradley v. State,** 134 Miss. 20, 90 So. 458 (1923).

The description given on the warrant "is not required to be as technical as in a deed of conveyance. . . ." **Holston,** 161 Miss. at 659, 137 So. at 503. The purpose of the description given is:

> [F]irst to inform the officer by the warrant where the premises are, or may be found, and, second, to enable the owner to determine whether the officer has legal authority to make a search, so that resistance will not be made, or should not be make, to the search.

Id. See also Matthews, 134 Miss. at 814, 100 So. at 20.

Finally, where the officers not only could, but did, locate the property by means of the description given in the warrant, that factor is evidence that the legal description was sufficient. **Cole,** 237 So.2d at 445; **Williams,** 198 Miss. at 851-52, 23 So.2d at 693.

In this case, the warrant sets out in some detail the exact location of Pool's trailer. Officer Landrum testified that the officers followed the route given on the warrant on the night of the arrest. Two officers who were familiar with the area testified that a person could get to Pool's trailer by using these directions. Another who was not familiar with the area testified that he could have gotten to the trailer by using those directions.

In the suppression hearing, the judge was required to act as the finder of fact on whether the warrant was adequate. While there was conflicting evidence in this case as to whether the directions on the warrant precisely described the surrounding terrain, the court apparently accepted the testimony of the officers that the description accurately described their route. "So long as the trial court applies the correct legal standards, we will not overturn a finding of fact made by a trial judge unless it be

clearly erroneous." **Neal v. State,** 451 So.2d 743, 753 (Miss. 1984). The trial judge does was not clearly in error on this finding.

Similarly, the issue of whether there was execution of the warrant by service upon Pool involved a question of fact. The officer testified that he served the warrant; Pool testified that he did not. No authority under Mississippi case law holds that the uncorroborated testimony of a police officer may not be used as evidence. Pool's testimony was also uncorroborated. As the Court held in **Gathright v. State,** 380 So.2d 1276 (Miss. 1980), "the credibility of witnesses is not for the reviewing court." **Id.** at 1278.

II.

FAILURE TO GRANT A CONTINUANCE.

The appellant's second assignment of error alleges that the trial court refused to grant his counsel sufficient time to prepare his case. Trial was initially set for July 31, 1984; however, on July 30, 1984, Pool's appointed counsel moved for a continuance. The motion cites several reasons for the necessity of more time and requests a continuance "until the next regular tem of this court. . . ." During the pretrial proceeding, the trial judge continued the case until the last week of the July term.

The record shows that this case was tried on Agusut 6, 1984, apparently without objection from the appellant or a request for an additional continuance. Furthermore, the failure to grant a further continuance was not cited as grounds for relief in the motion for a new trial.

Miss. Code Ann. §99-15-29 (1972) provides that:

> On all applications for a continuance the party **shall set forth in his affidavit the facts which he expects to**

prove by his absent witness or documents that the court may judge of the materiality of such facts, **the name and residence of the absent witness,** that he has used due diligence to procure the absent documents, or presence of the absent witness, as the case may be, stating in what such diligence consists, and that the continuance is not sought for delay only, but that justice may be done.

. . . .

No application for a continuance shall be considered in the absence of the party making the affidavit, unless his absence be accounted for to the satisfaction of the court. A denial of the continuance shall not be ground for reversal unless the supreme court shall be satisfied that injustice resulted therefrom. (emphasis added)

This statute was interpreted, in **McFadden v. State,** 408 So.2d 476 (Miss. 1981), as differentiating between continuances sought to procure absent witnesses and continuances sought to enable an attorney to prepare his case. Quoting from **Barnes v. State,** 249 So.2d 383, 384 (Miss.1971), the Court said:

> The application for continuance upon the ground that the attorney for the defendant has not had a reasonable time to prepare for trial is different from an application for continuance on the ground that there is an absent witness. When a witness is absent the movant must continue his effort to obtain the witness after having filed the motion required by Section 1520 Mississippi Code 1942 Annotated (1956). **See: King v. State,** 251 Miss. 161, 168 So.2d 637 (1964). On the other hand, a motion for continuance upon the ground that an attorney has not had sufficient time to prepare for trial is subject to proof and also as to facts as they may appear from that which is known to the trial court.

408 So. 2d at 479. In **McFadden,**the defendant sought a

continuance on grounds that the public defender had not had time to prepare his case. However, no proof was offered as to his workload. The Court upheld the lower court's denial of the continuance, since "the affidavit for continuance failed to comply with statutory requirments." 408 So.2d at 478-79.

In this case, Pool's motion for a continuance cited that: 1) his attorney had been diligently preparing his case since his appointment; 2) that there were only eight days from arraignment until August 2, 1984, the date set for trial upon request of the district attorney; 3) that many of the witnesses to be interviewed resided in an adjoing county; 4) that the continuance would not work to the detriment of the State; 5) that the defendant had been in jail since November 4, 1983, in Hattiesburg; and 6) that an affidavit by an attorney (Dan Wise) who represented Pool in another case was attached. The affidavit from Wise indicated that he was unable to undertake representation of Pool on August 2, 1984, because he would have inadequate time to prepare.

Pool's motion failed to meet the procedural requiremnts enunciated in §99-15-29. Pool did not set forth the facts to be proved by the absent witness, nor did he offer any proof as to his attorney's workload. Even if Pool could get over this procedural hurdle, the long-standing rule is that trial judges have great discretion in granting or denying continuances. **Carter v. State,** 473 So.2d 471 (Miss. 1985); **McClendon v. State,** 335 So.2d 887 (Miss. 1976); **Gatlin v. State,** 219 Miss. 167, 68 So.2d 291 (1953). That discretion must have been abused before this Court will overturn the failure to grant a continuance. The fact that the judge **did** continue the case until the last week of the term would indicate that there was no abuse of discretion.

Pool's attorney requested a continuance to the next term of court. In **Gooch v. State,** 384 So.2d 74 (Miss. 1980), cert. denied 450 U.S. 923, 101 S.Ct. 1374, 67 L.Ed.2d 352 (1981),

the defendant requested a continuance until the next term of court, under Miss. Code Ann. §11-1-9 (Supp. 1979), on grounds that his attorney was a member of the legislature. The trial judge continued the case until the day following the adjournment of the legislature. The court there held,

> The statute does not require that a continuance granted thereunder shall be to a subsequent term of court and does not require a continuance of any definite duration. In the absence of controlling statutory provisions, the length of time for which a continuance may be granted rests within the sound discretion of the trial court.

Id. at 76.

Finally, Pool is procedurally barred from raising this issue on appeal, as it was not listed as grounds in his motion for a new trial.

> The denial of a continuance in the trial court is not reviewable unless the party whose motion for continuance was denied makes a motion for a new trial on this ground, making the necessary proof to substantiate the motion.

Colson v. Sims, 220 So.2d 345, 347, n. 1 (Miss. 1969); **see also Jackson v. State,** 423 So.2d 129 (Miss. 1982).

III.

CONSTRUCTIVE POSSESSION.

Pool asserts, next, that his motion for a directed verdict should have been sustained because the State did not prove "that the appellant had actual possession of the drugs introduced into evidence and failed to prove knowledge and control of this evidence by the appellant."

The theory of constructive possession has been explained, in **Curry v. State,** 249 So.2d 414 (Miss. 1971), as follows:

> [T]here must be sufficient facts to warrant a finding that defendant was aware of the presence and character of the particular substance and was intentionally and consciously in possession of it. It need not be actual physical possession. Constructive possession may be shown by establishing that the drug involved was subject to his dominion or control. Proximity is usually an essential element, but by itself is not adequate in the absence of other incriminating circumstances.

Id. at 416. The theory was further defined in **Hamburg v. State,** 248 So.2d 430 (Miss. 1971), that "one who is the owner in possession of the premises . . . is presumed to be in constructive possession of the articles found in or on the property possessed." **Id.** at 432. This presumption is rebuttable, however, and does not relieve the State of its burden to prove guilt beyond a reasonable doubt. **Id.** Thus, "[w]here the premises upon which contraband is found is not in the exclusive possession of the accused, the accused is entitled to acquittal, absent some competent evidence connecting him with the contraband." **Powell v. State,** 355 So.2d 1378, 1379 (Miss. 1978). See also **Keys v. State,** 478 So.2d 266, 268 (Miss. 1985).

In this case, the drugs in question were found in a trailer admittedly owned by Pool. He also admitted that the bedroom in which the drugs were found was his, and this admission was corroborated by Strickland. Both Strickland and Steverson testified that the drugs found were Pool's half of drugs previously obtained by Pool and Steverson. Not only does this testimony suffice to show constructive possession, it approaches a showing of actual possession. The only evidence which Pool offered to rebut this testimony was the testimony of Dan Wise, which was intended to impeach Steverson. This evidence was insufficient to sustain a motion for a directed verdict.

IV.

EXCLUSION OF HEARSAY TESTIMONY.

Pool's last assignment of error is that the trial court should not have restricted or limited the testimony of Dan Wise. The court's ruling after the proffer of testimony indicates that it was based on the fact that the testimony was inadmissible hearsay, unless offered for purpose of impeachment. Since Steverson did not deny the statement which he purportedly made to Wise, the court reasoned, impeachment was improper.

As the Mississippi Supreme Court has held:

> If the witness confesses or admits having made the prior inconsistenct statements, ordinarily there is not necessity for further proof, as by the admission of the prior inconsistent written statement.

Hall v. State, 250 Miss. 253, 264, 165 So.2d 345, 350 (1964). In this case Steverson did not **admit** the statement to Wise, he merely did not deny it. Therefore, the testimony of Wise was necessary for impeachment of Steverson, and should have been admitted.

In **Barnes v. State,** 460 So.2d 126 (Miss. 1984), the Court found that testimony excluded by the trial court was not hearsay. After determining that the testimony was admissible, Justice Robertson went further to consider the effect of its exclusion. This reiterates the holding of **Knight v. State,** 248 Miss. at 856, 161 So.2d 521 (1964), that "the admission or exclusion of evidence must result in prejudice and harm, if a cause is to be reversed on that account." 248 Miss. at 856, 161 So.2d at 522. The question in the present case, then becomes whether the exclusion of Wise's testimony prejudiced Pool.

Steverson testified at trial that he told several people that Pool was not involved with the drugs. According to Steverson, he told that story after Pool promised to help lighten his sentence. He also admitted that he told several people that he set Pool up, and admitted that he had made several prior statements that were lies. Finally, he admitted that drug charges against him had been nolle prossed in return for his testimony. While Wise's statements should have been admitted, it is clear that Pool's attorney got all of the mileage he could out of Steverson's inconsistent statements. The jury was aware that Steverson's story had changed several times, and Wise's testimony would have been merely cumulative. No reversible error was committed in excluding it.

We therefore affirm John V. Pool's conviction and sentence.

AFFIRMED.

PATTERSON, C.J., WALKER AND ROY NOBLE LEE, P. JJ., AND HAWKINS, PRATHER, ROBERTSON, SULLIVAN AND ANDERSON, JJ., CONCUR.

APPENDIX C

also present? Do you recall that occasion?

A Yes, sir, I do.

Q Did you at that time tell the Sheriff's deputy who was named Kim James that Johnny Pool did not have anything to do with procuring or possessing these drugs?

A I can't truthfully remember if I did or if I didn't.

Q Do you deny that?

A I don't deny it.

Q All right. Do you deny having made the statement many times to others that you had set up Johnny to get him?

A That I had set him up?

Q Yes, sir.

A I said -- I told people in Forrest County, after I talked to Johnny, that I done it all. Yes, sir, I admit to that. I said that.

Q And now you tell us that those statements were lies?

A Yes, sir.

Q Do you recall having a conversation with Attorney Dan Wise of Hattiesburg?

A Yes. I remember talking to him. I didn't talk very much to him.

Q Did you make a statement to Attorney Dan Wise?

A Did I make a statement to Attorney Dan Wise?

Q Yes, sir.

A Yes, sir.

Q Concerning Johnny's implication in the possession

of these drugs?

A I remember I told Dan Wise -- Mr. Wise asked me if Johnny had anything to do with it, and he wanted to know the truth and I told him the truth.

I told him, yeah, Johnny knew about it.

Q Didn't you tell Mr. Wise at the Forrest County jail sometime in early May of this year when you were confined down there and he talked to you in that jail, didn't you tell him that Johnny Pool did not know or have anything to do with the drugs that were found at his trailer?

A I don't remember it.

Q Mr. Steverson, would you deny it?

A I won't deny that I told him that, no.

Q One thing that you are certain of is that what you have brought here today, and what you have brought to these jurors here today, is the truth, because you have sworn to it, haven't you?

A Yes, sir, I have.

Q All this other stuff you told at that time was lies; is that right?

A The parts pertaining to -- that he was innocent was lies, yes, sir.

Q Now, let me ask you this: Have you been promised anything to come here and testify today?

A No, sir.

Q Has anybody held out any hope of reward as far as not going to prosecute a particular case or something if you would testify against Johnny Pool?

drugs involved in this case -- that you had with him at that time?

MR. WALTERS:

If the Court please, we object.

TH COURT:

Sustained.

MR. MOYNIHAN:

If the court please, we take the position that Mr. Steverson denied --

MR. WALTERS:

-- no, sir.

MR. COLLINS:

He admitted it.

MR. MOYNIHAN:

He would neither admit nor deny the conversation.

THE COURT:

I sustain the objection.

MR. HOYNIHAN:

I believe that's all the questions we have of this witness.

MR. COLLINS:

We don't have anything.

MR. MOYHIHAN:

If the Court please, I would like in the absence of the jury to make a proffer on the testimony that Mr. Wise would testify to.

THE COURT:

All right. It will be necessary for the jury to go out again for a moment, please.

(THE JURY RETIRED TO THE JURY ROOM)

MR. COLLINS:

If the Court please, I need the record to reflect that the defendant's attorney and this witness have been conferring several times subsequent to him being discharged and to the time that the motion for a proffer was made and subsequent thereto.

THE COURT:

Proceed with your proffer.

MR. MOYNIHAN:

Q Mr. Wise, you were questioned a moment ago about a conversation that you had with one Vance Steverson at the Forrest County Regional Jail Complex in Hattiesburg, Mississippi and would you state to the Court what the substance of that conversation was as it relates to Johnny Pool and his possession of the drugs that he is charged with in this case?

A Yes, sir. I met with Mr. Steverson in the Forrest County Jail in the presence of his attorney in Hattiesburg, our public defender in Forrest County, Jeff Stewart, and initially I met -- I met with Mr. Steverson on more than one occasion -- and initially when I met with Mr. Steverson, he

advised me that Mr. Pool was not involved with the drugs that are in question in this case and that he did not have any knowledge of this, but that Mr. Steverson had other charges pending against him in Jones County, Mississippi not relating out of the charges here today and that -- I don't recall who, but some narcotics officers or some officers had suggested to Steverson that if Johnny Pool were in some way implicated in these charges here that other charges in Jones County might not be brought up, or would be disposed of, or passed to the file or something of this nature. When I became aware of that, I made that informtion known to the people in Hattiesburg, and went back to see Mr. Steverson either the next day or a day or two later, at which time he told me that he would like to help Mr. Pool out with testimony, but that he had been made aware that if he did testify in Court as to what he told me previously, that he would have further difficulty in Jones County. That he was sorry that he would not be able to make that statement which would be favorable to not implicating Mr. Pool, and that if I asked him a question along that line, he would indicate that his story to me was one thing before he was contacted by the Jones County authorities and that it was different afterward, but that was as far as he would feel comfortable in giving testimony.

Q Do you have anything further that you could add to what Mr. Steverson told you on that occasion that relates to Johnny Pool and this charge here?

A No, sir.